IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-977

HUBBARD BROADCASTING, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and
UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MELVIN H. SIEGEL
LEONARD, STREET AND DEINARD
1200 National City Bank Building
Minneapolis, Minn. 55402

FRANK U. FLETCHER
EDWARD F. KENEHAN
FLETCHER, HEALD, KENEHAN & HILDRETH
1225 Connecticut Avenue, N.W.
Suite 400
Washington, D.C. 20036

Attorneys for Petitioner Hubbard Broadcasting, Inc.

Washington, D.C. • THIEL PRESS • (202) 638-4521

TABLE OF CONTENTS

CITATIONS

Cases:

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No.

HUBBARD BROADCASTING, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and
UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Hubbard Broadcasting, Inc., petitions that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on September 22, 1977.

OPINION BELOW

The judgment of the court of appeals entered on September 22, 1977 (App., p. 114)[1] has not been published. The order of the Federal Communications Commission (App., pp. 82-113) is reported at 59 F.C.C.2d 32 (1976).

---

[1] The appendices to this petition are set forth under separate cover.

JURISDICTION

The judgment of the court of appeals was entered on September 22, 1977 (App., p. 114) and this petition for certiorari is being filed within the time allowed by the Court. By order dated December 22, 1977, Mr. Chief Justice Warren Burger extended to January 6, 1977, the time within which to file a petition for writ of certiorari (No. A-529). This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

Section 307(b) of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. §307(b), is set forth in the Appendix at page 1.

QUESTION PRESENTED

The judgment of the court of appeals presents the following question:

> Whether the Federal Communications Commission, in allocating AM frequencies and in awarding licenses between mutually exclusive applications for use of the frequencies in different communities in accordance with such allocations can, under the mandate of Section 307(b) of the Communications Act, select one community or area over another, not on the basis of the greater need of one community or area, but on the basis that one radio network station was entitled to continue to enjoy comparatively equal network facilities vis-a-vis the other radio networks with which it competes.

STATEMENT OF THE CASE

This petition seeks review of a September 22, 1977, *per curiam* judgment of the United States Court of Appeals for the District of Columbia Circuit (App., p.

114) affirming a Report and Order of the Federal Communications Commission released April 30, 1976. (App., p. 82). The Report and Order, among other things, adopted an amendment to Section 73.25 of the Commission's Rules (47 C.F.R. §73.25) that will require AM broadcast station KOB, Albuquerque, New Mexico, to operate with inferior facilities, i.e., as a Class II-A station rather than as a Class I-B station, the latter status having been granted to it by the Commission in 1958 following lengthy hearings and other proceedings. *Albuquerque Broadcasting Company*, 25 F.C.C. 683 (1958).[2]

The reviewing court's judgment simply states that the "Court is in general agreement with the reasons stated in the Commission's Report and Order" and, on that basis, the court affirmed. (App., p. 115). Basically, therefore, what this Court is called upon to review is the April 30, 1976 Report and Order of the Commission, the reasoning

---

[2] A Class I-A station is one which is dominant on a clear channel rendering service over a wide area, and entitled to operate alone on that channel or without interference from any other station on the same channel.

A Class I-B station is one which shares a clear channel with another Class I-B station, each of which is required to protect the other by directionalization.

A Class II-A station is one which operates on the same channel with a Class I-A station but which is required to protect the Class I-A station by directionalization, without any corresponding protection from the Class I-A station.

A primary service area is one in which the groundwave (signal following the earth's contour and therefore relatively short-distanced) is not subject to objectionable interference or objectionable fading, whereas a secondary service area is one served by a skywave signal which may be subject to intermittent variations in intensity but is not subject to objectionable interference (47 C.F.R. §73.11).

of which the court of appeals has adopted as its own.[3]

The lengthy history of this controversy may be briefly summarized. WABC is an AM radio station owned and operated by American Broadcasting Companies, Inc. ("ABC") with transmission facilities located in New York City. KOB is also an AM radio station, owned and operated by Hubbard Broadcasting, Inc., with transmission facilities in Albuquerque, New Mexico.

In 1941, the two stations were reassigned to the same frequency, 770 kHz, their former channels having become unavailable for their use under an Agreement ("NARBA") between the United States, Canada and Mexico. In March of that year, WABC (then WJZ) was authorized by the Federal Communications Commission ("the Commission") to operate on the frequency 770 kHz as a Class I-A station. In October of the same year KOB was also authorized to operate on the same frequency, albeit on a temporary basis. After a succession of Commission orders continuing KOB temporarily on 770 kHz, the court below, on ABC's appeal, directed the Commission to proceed with a full hearing to resolve the conflict between the two stations. *American Broadcasting Co., Inc. v. Federal Communications Commission et al.*, 191 F.2d 492, 501-02 (D.C. Cir. 1951).

In 1958 the Commission, following an *ad hoc* proceeding involving a contest between KOB and WABC alone, entered an order dividing the two operations on channel 770 kHz, classifying both WABC and KOB as Class I-B on that channel, and directing both to use

[3]The background of this case is set forth in the Report and Order in question (App., p. 82) and in the Commission's April 25, 1969 Notice of Proposed Rule Making (App., p. 42) which instituted the proceeding leading to the said Report and Order.

directional antennas so as to protect the other from interference within specified limitations. The Commission found that this mode of operation would give first primary service to a substantial number of people in the Southwest without corresponding loss elsewhere since those persons lost to WABC had other primary services from other stations. *Albuquerque Broadcasting Company, supra.* In 1960, the court of appeals affirmed this order, but stated that the Commission *in other proceedings* should give due consideration to WABC's claim for equality of network facilities with those of the New York AM radio stations of the Columbia Broadcasting System ("CBS") and the National Broadcasting Company ("NBC"). *American Broadcasting – Paramount Theatres, Inc. v. Federal Communications Commission,* 280 F.2d 631, 635-36 (D.C. Cir. 1960).

In the ensuing proceedings, the Commission determined that the existing classifications of the two stations should remain unchanged. In 1961, in a so-called "clear channel" proceeding involving a large number of other channels, the Commission left the CBS and NBC New York radio stations as Class I-A stations. On certain of these other channels, the Commission authorized a new Class II-A station to operate on the same channel with the existing Class I-A station. The Commission, however, employing a "broad perspective" (App., p. 65) did not require the I-A stations to directionalize because, it said, "substantial new white areas would be created in which no groundwave [primary] service would remain available from any station". (App., p. 66).

Thereafter, in 1963, the Commission, again in a specific *ad hoc* proceeding involving a contest between WABC and KOB alone, reaffirmed its 1958 decision classifying both stations as I-B, as well as the above-mentioned

findings on which that decision was based. The Commission further found that ABC had failed to meet its burden of proving that its competitive position over the country as a whole would be adversely affected. *Hubbard Broadcasting, Inc.*, 35 F.C.C. 36 (1963).

In 1965, the court of appeals reversed, pointing out that the Commission had failed to give "adequate public interest reasons" for continuing WABC in a position of inequality of network facilities as compared with the competing New York stations of CBS and NBC. Accordingly, it directed the Commission as a possible solution to determine first whether the Commission's decision in 1958 as to the needs of the areas served by KOB in the Southwest had changed so that KOB could, consistent with the public interest, be reclassified as a II-A station, or, alternatively, to consider placing the ABC, CBS and NBC New York stations on a parity by classifying the CBS and NBC New York stations as Class I-B's. *American Broadcasting Company – Paramount Theatres, Inc. v. Federal Communications Commission*, 345 F.2d 954, 958, 960 (D.C. Cir. 1965), *cert. den.* 383 U.S. 906 (1966).

In subsequent proceedings, the Commission, first in its Notice of Proposed Rule Making, April 25, 1969 (App., p. 78) and then in its Report and Order of April 30, 1976 (App., p. 108) determined that KOB should be changed to a II-A station.

The criteria used by the Commission in making this determination differed markedly from that which it had used in its 1958 order, reaffirmed in 1963, classifying both WABC and KOB as Class I-B stations. In its 1958 order, the Commission weighed the needs of the area served by KOB in the Southwest as compared with the needs served by WABC in the East, and found that the I-B

classification for both stations was required in order to provide a first primary service to over 118,000 persons in the Southwest who would not otherwise receive any primary service and that the service that would be lost to WABC would be supplied by other stations if WABC were classified I-B. The result, as the Commission subsequently more fully explained, was to:

> ". . . permit simultaneous full-time operation by radio stations KOB, in Albuquerque, New Mexico and WABC in New York on the same frequency (770 kHz), with the same power (50 kw), but requiring each station to afford a measure of protection to the other during nighttime hours through the installation of directional antenna systems. *Albuquerque Broadcasting Company*, 25 F.C.C. 683. *The Commission's objective was to provide an additional nighttime radio signal to the comparatively underserved southwestern part of the country.* This was done by enlarging the KOB nighttime service area and curtailing that of WABC, the so-called 'flagship' station of the ABC radio network, which has previously operated without a directional antenna as the dominant 'clear channel' station on 770 kc. The Commission found that enlarged nighttime operation by KOB would better serve the public interest because it would provide a first primary nighttime service to approximately 119,000 persons and a secondary nighttime service to approximately 3,000,000 persons lacking adequate secondary service. *It concluded that these services in the southwest outweighed the much larger losses of WABC nighttime service in the east* through WABC's directionalization (a loss of primary service to some 700,000 persons and secondary service to approximately 17,000,000 persons) *because all persons losing WABC's nighttime service had other primary*

service and abundant secondary service. Technically, the result of the Commission's action was to give KOB a Class I-B license." (Footnote omitted)[4]

However, in its later Notice of Proposed Rule Making in 1969 and in its Report and Order of 1976, the Commission concluded that it could not apply the same criteria consistently with preserving a position of equality of WABC with the CBS and NBC radio stations notwithstanding the unserved needs for primary AM service provided by KOB. As to this, the Commission acknowledged that its present determination ". . . varies from conclusions reached earlier as to the need for improved AM nighttime primary and secondary service in the Southwest, a need which, as far as an AM service alone is concerned, does not appear to have changed substantially since the earlier KOB decision. . ." (App., p. 78). The Commission, moreover, declined to achieve network equality by placing all three New York stations in a Class I-B status because "such a directionalization by all three New York Class I-A stations would result in very extensive losses of service in the densely populated northeastern part of the country," where " 'white areas' *might* result if the service of all three stations were lost." (App., pp. 67, 99) (emphasis added).[5] Accordingly, the Commission concluded that ". . . a 'II-A' status for KOB will not disserve the public interest." (App., p. 109).

---

[4] Federal Communications Commission, Petition for Writ of Certiorari, Supreme Court of the United States, Case No. 397, October Term, 1965, at 3-4. (emphasis added). As shown more fully below, the Commission's controlling consideration was the addition of "*first primary service*" to more than 100,000 persons in the Southwest, *see* pp. 11-12, *infra.*

[5] A "white area" in accepted usage means an area that receives no primary service.

REASONS FOR GRANTING THE WRIT

1. THE COMMISSION'S ORDER, AFFIRMED BY THE COURT BELOW, PRESENTS AN IMPORTANT QUESTION OF STATUTORY CONSTRUCTION OF SECTION 307(b) OF THE FEDERAL COMMUNICATIONS ACT WHICH WAS RESOLVED BELOW IN A MANNER IN CONFLICT WITH THE AVOWED PURPOSE OF CONGRESS.

Section 307(b) of the Federal Communications Act (47 U.S.C. §307(b)) requires the Commission to make such allocations of broadcast facilities

> "among the several States and Communities as to provide a fair, efficient and equitable distribution of radio service to each of the same."

The avowed purpose of Section 307(b) was to avoid concentration of facilities in the heavily populated areas and thus assure service to the "sparsely populated" areas. This policy of wide dispersion of transmission facilities dictated the Commission's original decision to make both KOB and WABC Class I-B stations. The Commission's present order radically alters this policy. The Commission now applies this policy only if the competing network facilities, typically located in the more populated areas, are placed in a position of relative equality. It thus defeats the avowed purpose of Congress to assure adequate service to sparsely populated areas.

a. A primary purpose of Section 307(b) was to assure service to the sparsely populated areas. The critical language of Section 307(b) quoted above was originally included in Section 9(b) of the Radio Act of 1927. 44 Stat. 1162 (1927). Fears had even then been expressed that this language would be insufficient to secure facilities for the sparsely populated areas, partic-

ularly because of the omission from the bill emerging from conference of a requirement that "due consideration of the right to each state to have allocated to it or to some [entity] within it, the use of a wave length." 68 Cong. Rec. 2557 (1927).

Within a year these fears were realized in practice. Noticeable deficiencies in services were found in portions of the South and West; stations were concentrated in the North and East. To correct this deficiency, the so-called Davis amendment was enacted in 1928. Act of March 28, 1928, 45 Stat. 373. It required the licensing authority to make an equal allocation of broadcasting facilities among five zones and an equitable distribution of such facilities among the states within each zone according to population. In explanation, Congressman McKeown stated (69 Cong. Rec. 4489 (1928)):

> "The Commission has construed an equitable distribution to mean from the standpoint of the listener. If he can have a receiver in Arizona that can hear New York, that is enough for him, and they say that is a fair and equitable distribution . . . We are asking to pass this legislation [referring to the Davis amendment] so that the Commission will not do as it has in the past, ignore all the rest of the country and let the few stations in New York and Chicago dominate the whole broadcasting country."

The Davis amendment was carried forward in Section 307(b) of the Communications Act of 1934, as originally enacted. Unfortunately, the mechanical formula thereby imposed actually resulted in "concentration of the use of frequencies in centers of population, and the restriction of facilities in sparsely populated states." H.R. Rep. No. 2589, 74th Cong., 2d Sess. 3 (1938).

As a result, the Congress in 1935 repealed the Davis

amendment and substituted the present Section 307(b). The effect was to restore the language contained in the original Section 9(b) of the Radio Act of 1927, but with the avowed purpose of eliminating the unworkable quota system and of allowing "sparsely populated" areas, especially in the West and Midwest, to "secur[e] the facilities we ought to have to meet the demands of that section of the country." 80 Cong. Rec. 6032 (1936); H.R. No. 2589, *supra* at 3. *See Pasadena Broadcasting Co. v. Federal Communications Commission,* 555 F.2d 1046, 1050 (D.C. Cir. 1977).

b. To carry out the mandate of Section 307(b), the Commission "held in numerous decisions and pronouncements that one of its most important obligations in carrying out this mandate through the allocation of broadcast facilities is to provide a *first primary service* to all the populations of this country, to the extent that it is possi- to do so," as the Commission stated in *Albuquerque Broadcasting Co., supra.* There the Commission cited as illustrative *WJIM, Inc.*, 12 F.C.C. 406 (1947), *aff'd sub nom. Radio Cincinnati, Inc. v. Federal Communications Commission,* 177 F.2d 92 (D.C. Cir. 1949) where the community found to have the greater need was one which would be provided a *first* primary nighttime service to a population of only 5,000, in preference to a community which would receive *additional* primary service for more than 1,250,000 persons.

c. This priority dictated the decision of the Commission, made originally in *Albuquerque Broadcasting Co., supra,* in 1958, and reaffirmed in 1963 in *Hubbard Broadcasting Inc., supra,* to place both KOB and WABC on 770 kHz as Class I-B stations. The Commission in so doing stressed its mentioned obligation "to provide a *first primary service* to all the populations of this country," as

applied in *WJIM, Inc., supra. See* 25 F.C.C. at 779. Applying this test, the Commission found that this mode of operation "would bring the only primary service nighttime to more than 100,000 persons who would not receive it" otherwise, while "the curtailment of the service of WABC" itself, albeit involving a much larger population, "would not cause any loss whatsoever of primary service to those persons" losing WABC service, since primary service was available to them from other stations, including stations affiliated with ABC and other networks. *Id.*

d. The present order of the Commission affirmed below makes a radical change in the application of Section 307(b). Now, contrary to its previous "numerous decisions and pronouncements," the Commission will no longer give first priority to providing a "first primary service to all of the populations of this country," unless it also finds that competing network facilities will remain in a position of relative equality, and this though the effect is to subordinate the needs of the sparsely populated Southwest areas to those of the heavily populated areas of the East.

The Commission, moreover, left no doubt that its new policy extended to the facilities of the three major networks wherever located. The Commission stressed as its own policy that "network service is of high importance" (App., p. 69) and hence concluded that it should look at the situation in a more general sense, "involving not only the New York stations of the three major networks" but "ABC as one of three network companies owning radio facilities in the country's largest market as well as in other places, and the desirability of putting these facilities on an equal footing." (App. pp. 106, 107).

In applying these requirements, the Commission gave preference to the needs of the "densely populated" areas of the East over the smaller population of the Southwest. (App., pp. 67, 77, 99). As noted above, the court of appeals had left to the Commission, as one alternative, to make a "new assessment of the public interest needs of the Southwest" (App., p. 71) and the Commission concluded that "as far as AM service is concerned, the needs in the area have not substantially lessened since 1958". (App., pp. 71, 75). But while the Commission found "considerable merit in the concept of assigning class I-B operations" to KOB and WABC, it did not consider itself free to make this choice unless it also required the CBS and NBC stations in New York to directionalize as the court of appeals had suggested as a second alternative. (App., p. 108). The Commission rejected this alternative lest the needs of the East be sacrificed to those of the Southwest. Applying the "broad perspective" it had used in connection with other clear channels (App., p. 65), the Commission stated that, as a primary service, " 'white areas' *might* result" (App., p. 67) (emphasis added) in the "densely populated northeastern part of the country" if "the service of all three stations were lost" (App., p. 99) with "at most a gain in service in the Southwest (to a population that is not extremely large). . .". (App., p. 77).[6]

The Commission's new policy is one of manifest im-

[6]Similarly, the Commission stated that the needs of the Southwest area for AM service may have been somewhat reduced by the establishment of FM stations now serving 25% of the area of New Mexico, without making any finding as to the extent to which such FM service merely duplicated the existing AM service of KOB or how many persons would receive such FM service from among those who would be lost to KOB if reclassified as a II-A station. (App., pp. 102-03).

portance. As applied to the cities of the largest population, in which the major networks own their own radio stations, it means that preference must now be given to the heavily populated areas, "precisely the result Congress meant to forestall by means of Section 307(b)". *See Pasadena Broadcasting Company v. Federal Communications Commission, supra* at 1050. Even in those areas in which the network stations are affiliated by agreement and not by ownership, priority of unserved need as among the communities or areas to be served can no longer be applied as the touchstone of choice but must yield to the controlling consideration of preservation of equality of network facilities.

e. The Commission's references to WABC as the "flagship" station of ABC (*see e.g.*, App., pp. 88, 104-06) only serve to emphasize the importance of the question of statutory construction presented. Without dispute, WABC carries "network" material during less than 10% of its composite week, and thus serves principally as a "local New York City station for the benefit of New York advertisers". (App., p. 95). Petitioner's claim that the balance of WABC's programming consists of "rock and roll" and "disc jockey chatter" (App., pp. 24, 58) is nowhere contradicted by the Commission's findings. (App., pp. 95, 96). Yet the Commission concluded that WABC's "small amount" of "network programs" (App., p. 107) was still a "valid" reason for applying the network "concept" to place ABC radio facilities on an "equal footing" with those of CBS and NBC. (App., p. 106).

Nothing could more graphically illustrate the radical change made by the Commission in the application of Section 307(b), subordinating as it does, and on such tenuous grounds, the needs of the sparsely populated

areas in disregard of the avowed purpose of Congress in enacting Section 307(b).

2. THE ORDER OF THE COMMISSION AS AFFIRMED BY THE COURT BELOW IS IN CONFLICT WITH THE DECISION OF THIS COURT IN *FEDERAL COMMUNICATIONS COMMISSION v. ALLENTOWN BROADCASTING CORPORATION*

In *Federal Communications Commission v. Allentown Broadcasting Corporation*, 349 U.S. 361 (1955), this Court approved the Commission's then-established test for applying Section 307(b) that

> "[w]hen mutually exclusive applicants seek authority to serve different communities, the Commission first determines which community has the greatest need for additional services and then determine[s] which applicant can best serve that community's need."

Save in this proceeding, the rule in *Allentown* has ever since been regarded as controlling in the application of Section 307(b). *See Pasadena Broadcasting Company v. Federal Communications Commission, supra* at 1050.

In *Allentown*, this Court held that when the Commission has determined that one community's needs are greater than another's and those needs can best be served by one applicant, the Commission cannot award the permit to another applicant simply because that other applicant is better qualified to render radio service to *another* community. Here the Commission, in an order approved by the court below, has added still another basic criterion which would permit the Commission to sacrifice the unserved needs of a community in order to establish competitive equality in another area among the three major networks. So radical a change from the

rule in *Allentown*, we respectfully submit, should not be sanctioned without the approval of this Court.

CONCLUSION

The matter in controversy has had an unduly protracted history. Understandably, the Commission may no longer have a clear recollection of the deliberations of Congress, extending over almost a decade from 1927 to 1936, which defined the basic objectives of the present Section 307(b) of the Communications Act – or the rule in *Allentown*, approved by this Court in 1955, which effectuates the Congressional intent. But the Congressional mandate to secure broadcast service for the sparsely populated areas stands unchanged and, unless and until changed by Congress, must govern this and all other allocations of broadcast facilities under Section 307(b).

FOR THE FOREGOING REASONS, it is respectfully submitted that this petition for writ of certiorari be granted.

Respectfully submitted,

MELVIN H. SIEGEL

LEONARD, STREET
AND DEINARD
1200 National City
Bank Building
Minneapolis, Minn. 55402

FRANK U. FLETCHER
EDWARD F. KENEHAN

FLETCHER, HEALD, KENEHAN
& HILDRETH
1225 Connecticut Avenue, N.W.
Suite 400
Washington, D.C. 20036

Attorneys for Petitioner
Hubbard Broadcasting, Inc.